ABDUL AZIZ JELANI & ANOR

v.

PETER CHUA SWEE LAI

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[CIVIL APPEAL NO: R1-12-301-97]
15 FEBRUARY 2000

TORT: *Defamation - Police report - Allegation that plaintiff committed criminal breach of trust - Whether defamatory - Whether a misuse of process of law - Failure to prove truth of allegation - Whether plea of justification must fail - Absence of positive belief or honest belief in allegation - Whether defence of fair comment and privileged occasion must also fail*

The plaintiff sued the defendants for defamation when the latter lodged a police report stating that the plaintiff had committed criminal breach of trust in respect of monies belonging to the second appellant. In the Sessions Court, evidence was led which showed that the defendants were not so sure whether the plaintiff had committed the alleged offence, but had nevertheless lodged the police report in order to get the assistance of the police to probe into the matter. The defendants raised the defence of qualified privilege, justification and fair comment, but had failed to prove that the allegation was true, or that they had positive or honest belief in its truth. The learned Sessions Court judge rejected the defence, and, having found the words complained of to be defamatory, awarded the plaintiff RM25,000 in damages. This was the defendants' appeal.

Held:

[1] It is up to the defendants to show positive evidence that the plaintiff had received the money and that he had dishonestly misappropriated or converted the cash. The burden was certainly not discharged and the defendants' plea of justification cannot therefore stand.

[2] A defamer is entitled to the protection of privilege if he can prove he has positive belief or honest belief in the truth of what he published. If he publishes untrue defamatory matter recklessly, or without considering or caring whether it be true or not, as happened here, he is treated as if he knows it to be false. In any case, the Sessions Court judge was right in the finding that, even on the presumption that the occasion was privileged, the defendants have failed to survive the test of 'honest belief' or 'positive belief' as laid down in *Harrocks v. Lowe*.

[3] The defendants in publishing the defamatory statement did not believe the statement to be true. They merely wanted the assistance of the police to get the plaintiff to explain to them about the receipt. This is a misuse of the process of law and is conclusive evidence of express malice on the part of the defendants. The defence of privilege was properly rejected by the learned judge of the Sessions Court.

[4] The award of RM25,000 made by the court below is reasonable and ought to stay.

[Appeal dismissed; cross appeal dismissed.]

Case(s) referred to:
Abdul Rahman Talib v. Seenivasagam & Anor [1966] 2 MLJ 66 ***(refd)***
Danby v. Beardley [1880] 43 LT 603 ***(refd)***
Horrocks v. Lowe [1974] 1 All ER 662 ***(foll)***
Martin v. Watson [1994] 2 All ER 600 ***(refd)***
Mohamed Lajan v. Daud [1963] 29 MLJ 209 ***(refd)***
Sewell v. National Telephone Co Ltd [1907] 1 KB 577 ***(refd)***

Legislation referred to:
Defamation Act 1957, s. 8

For the appellant - KS Lopez; M/s Kamarudin & Partners
For the respondent - K Kulasekar; M/s Kulasekar & Assoc

Reported by Nik Aras Yusof

JUDGMENT

KC Vohrah J:

A police report made by the 1st defendant (the 1st appellant) on behalf of the 2nd defendant company (the 2nd appellant) on 4 July 1990 at a Petaling Jaya Police Station, *inter alia*, referred to the plaintiff, Peter Chua Swee Lai, in the following terms:

> Kami yakin yang Peter Chua Swee Lai NRIC 4531444 semasa beliau menjadi Pengarah Urusan di syarikat ini telah memecah amanah.
>
> (the company believes or is convinced that Peter Chua Swee Lai NRIC No. 4531444 committed breach of trust when he was the Managing Director in the Defendant Company)

The plaintiff sued for defamation on the police report in the Kuala Lumpur Sessions Court. The judge of the Sessions Court found the words complained of to be defamatory.

The judge found, and it was not disputed, that the 1st defendant was the agent of the 2nd defendant and that he had acted on the instruction of the 2nd defendant when he made the police report.

She found that the defamatory words positively referred to or identified the plaintiff and that is quite clear from the evidence. She also found that there was publication of the defamatory words to third parties, to police constables and others. I do not think that that finding can be disputed as the police report was given in a police station to a police officer and an investigation officer investigated the allegation in the report resulting in the plaintiff being arrested though subsequently he was freed with no criminal charges preferred against him.

The defences raised by the defendants were the defences of qualified privilege, justification and fair comment. The judge rejected all three defences.

The plaintiff and his family members were the original owners and managers of the 2nd defendant company. The plaintiff was the managing director and his relatives were the managers in charge of accounts, production and sale. The defendant company under the management of the plaintiff incurred losses and owed money to its creditors. The major creditor was Kee Hup Berhad.

As the defendant company was unable to pay its debts, the plaintiff offered to Kee Hup Berhad and Kee Hup Berhad accepted the option to take over the entire paid up capital of the defendant company in lieu of payment of the said debt.

One of the debtors of the defendant company listed in the option agreement was South Star Air Conditioning Engineering Sdn Bhd ("South Star"). South Star owed the defendant company RM7,497.49. Kee Hup Berhad in exercising the option in the option agreement took over the defendant company on 30 March 1990. The plaintiff resigned on 22 March 1990 and the new management then stepped in.

Evidence was adduced that an inquiry into the accounts was done by the new management of the defendant company and after attempting to collect the debts from the debtors as listed in the option agreement, including from South Star, it was found that an undated receipt signed by the plaintiff had been issued to South Star acknowledging receipt of RM7,000 in cash from South Star.

The defendant company had difficulty in getting in touch with the plaintiff or his brother Melvin Chua for an explanation with regard to the receipt and the unaccounted sum of RM7,000. The Board of Directors of the defendant company then resolved to report the matter to the police to seek their assistance to conduct investigations. The 1st defendant stated that the receipt had the plaintiff's signature and the company assumed the money was collected by the plaintiff. He said that the company "decided the police would be of assistance and therefore we lodged the police report." On the instruction of the defendant company, the 1st defendant, as an officer of the defendant company, lodged the report on 4 July 1990.

In this appeal the defendants have brought up several issues relating to malicious prosecution, justification and privilege.

Malicious Prosecution

In this ground of appeal the 1st and 2nd defendants contend that the cause of action, if any, should have been one for malicious prosecution and not defamation and relied on the case of *Sewell v. National Telephone Co Ltd* [1907] 1 KB 577 and *Mohamed Lajan v. Daud* [1963] 29 MLJ 209 as it appeared that the 2nd defendant, through the 1st defendant, had taken a step which was essential to the carrying out of the criminal prosecution of the plaintiff. To prosecute is to set the law in motion and the law is set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question and to be liable for malicious a person must be actively instrumental in so setting the law in motion: *Danby v. Beardley* [1880] 43 LT 603; *Martin v. Watson* [1994] 2 All ER 600. In the instant case it is clear from the evidence that although the plaintiff was arrested he was released without any charge made against him in a court of law and thus he could not have brought a case of malicious prosecution against the defendants.

It has to be observed that the plaintiff did sue for false imprisonment but abandoned the claim in the lower court.

Justification

The defendants have disputed the various findings of facts by the judge of the Sessions Court where she concluded that the defence of justification cannot succeed in the case.

The judge has pointed out that the defendants have the burden to show that the defamatory words are true (bearing in mind s. 8 of the Defamation Act 1957 (see *Abdul Rahman Talib v. Seenivasagam & Anor* [1966] 2 MLJ 66). She correctly stated that a defendant cannot justify by proving that he honestly believed the words complained of to be true. If the defendant

states that he believes the plaintiff has committed criminal breach of trust, he cannot justify by saying and proving he did so believe; he can only justify by proving the fact of the criminal breach of trust. Her finding was that from the evidence, the defendants did not make any inquiry in writing as to the unaccounted RM7,000 from the plaintiff before making the police report; they only wrote to the plaintiff after making the police report. I observe that her examination of the evidence was a careful one. She noted that the defendants had decided to make a police report after receiving the receipt signed by the plaintiff, supplied by the debt collector, Double RR Collection (M) Sdn Bhd, and also after being informed by the accounts lady who kept the books in the company that there was a discrepancy in the accounts. She pertinently and correctly pointed out that except for the presence of the receipt of RM7,000 which was not disputed, the defendants did not *subpoena* the debt collector or the accounts clerk to support or substantiate its contention that the 2nd defendant honestly believed that the plaintiff had committed criminal breach of trust.

She next turned to the evidence of Abdul Aziz Jelani, DW1, who stated in examination-in-chief that he had filed the police report after the plaintiff had left the company, the intention of filing the police report, since the plaintiff had left the company not on the best of terms and it was difficult to get the accounts from him, being to get police assistance in the matter.

She also referred to his further evidence that after seeing the receipt for RM7,000 which receipt showed the plaintiff's signature, he had stated, "... we assume that the money was collected by Peter" and that the board of the 2nd defendant decided to lodge a police report and he as an employee carried out the instruction. She observed that his evidence that "we assume that the money was collected by Peter" and that the board decided to lodge a police report and he as an employee had carried out the instruction the 1st defendant meant that the board had assumed that just because the receipt was signed by the plaintiff then the plaintiff must have collected the RM7,000 for himself, it was with this assumption that the board had instructed Abdul Aziz Jelani to make a police report stating that they believed or were convinced that Peter Chua had committed criminal breach of trust while he was the managing director of the company.

The defendants had contended before the court below and before me that since the receipt for the RM7,000 is not disputed (as it is in the agreed bundle), then the burden of proof in establishing the truth of the statement that the plaintiff had committed criminal breach of trust, which burden lies with the defendant, had now shifted to the plaintiff and that the plaintiff therefore had to call the debt collector, Double RR Collection or the recipient of the receipt, South Star, to rebut the allegation of criminal breach of trust.

The contention has no basis. The accusation relates to the offence of criminal breach of trust meaning that the plaintiff had been entrusted with the cash and had dishonestly misappropriated or converted the cash. It is up to the defendants to show positive evidence that the plaintiff had received the money and that he had dishonestly misappropriated or converted the cash. The burden on the defendants to prove these matters was certainly not discharged.

Bearing in mind the evidence that the plaintiff had stated that he had signed many blank receipts and in fact the receipt on which the defendants relied shows that although the plaintiff had signed it (he admitted it) the other entries in the receipt were definitely not in his handwriting and it was for the defendants to call whoever it was who made the entries to show that they were made after the plaintiff had personally received the money if that was so. But even assuming that the plaintiff had received the money it was for the defendants to prove that, as stated earlier, that he had dishonestly misappropriated or converted the cash.

Clearly the plea of justification cannot stand.

The defendants have complained that the plaintiff had chosen to hide behind the letter of release (P3) which the 2nd defendant had given to the plaintiff absolving him from all liabilities when the letter could not absolve him from any illegal or unlawful act of his. I agree such a letter cannot absolve him from any illegal or unlawful act but it has not been proved that the plaintiff had committed criminal breach of trust nor did the Sessions Court judge at all advert to P3 in her decision.

Qualified Privilege

The defendants contend that the defence of qualified privilege is available to them as the making of the police report upon their discovering that monies paid to the 2nd defendant company by its debtor, South Star, through the plaintiff and not accounted for by him, was an occasion of privilege; on grounds of public policy and convenience, the defendants may, without incurring legal liability, make statements to the police about the plaintiff which are defamatory and in fact untrue. Additionally, the report was made in the discharge of a private duty. It was made *bona fide* for the purpose of inquiring into a suspected crime and for the purpose of the punishment of the criminal. The 2nd defendant had suspected or had reason to suspect that the plaintiff had committed breach of trust of its monies and therefore had reported the matter to the police. Again, it was argued that there was a public duty of everyone who reasonably knows or reasonably believes that a crime has been committed to assist in the discovery of the wrongdoer and the information given in this case will in the interest of society be privileged.

What the defendants have failed to take into account is the case of *Horrocks v. Lowe* [1974] 1 All ER 662 decided by the House of Lords but which the judge of the Sessions Court considered; that "the defamer is entitled to the protection of privilege if he can prove he has positive belief in the truth of what he published or honest belief. If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is treated as if he knows it to be false."

Lord Diplock gives a clear perspective of qualified privilege at 668 and 669:

> My Lords, as a general rule, English law gives effect to the Ninth Commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction: if he cannot prove that defamatory matter which he published was true, he is liable in damages to whomsoever he has defamed, except where the publication is oral only, causes no damage and falls outside the categories of slander actionable *per se*. The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny, has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters with respect to which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. With some exceptions which are irrelevant to the instant appeal, the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit – the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege.

Lord Diplock then focuses on the matter of the dominant and improper motive for making a defamatory statement in which the privilege is lost:

> So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. 'Express malice' is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in *bona fide* protection of his own legitimate interests.

The motive with which a person published of defamatory matter can only be inferred from what he did or said or knew. This is how Lord Diplock put it:

> The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.

The judge of the Sessions Court considered this passage of Lord Diplock when she adverted to the principle that the defamer is entitled to the protection of privilege if he can prove the positive belief or honest belief in the truth of what he published:

> "Apart from those exceptional cases, what is required on the apart of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, 'honest belief'. If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead by reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might case doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be 'honest', ie, a positive belief that the conclusions they have reached are true. The law demands no more.
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> Even a positive belief in the truth of what is published on a privileged occasion – which is presumed unless the contrary is proved – may not be sufficient to negative express malice if it can be proved that the defendant misused the occasion for some purpose other than that for which the privilege is accorded by the law. The commonest case is where the dominant motive which actuates the defendant is not a desire to perform the relevant duty or to protect the relevant interest, but to give vent to his personal spite or ill-will towards the

> person he defames. If this be proved, then even positive belief in the truth of what is published will not enable the defamer to avail himself of the protection of the privilege to which he would otherwise have been entitled. There may be instances of improper motives which destroy the privilege apart from personal spite. A defendant's dominant motive may have been to obtain some private advantage unconnected with the duty or the interest which constitutes the reason for the privilege. If so, he loses the benefit of the privilege despite his positive belief that what he said or wrote was true.

In the context of *Horrocks v. Lowe* the learned judge of the Sessions Court made a positive finding that the defendants on the assumption that the occasion was privileged, have failed to survive the test of 'honest belief' or "positive belief" as laid down by Lord Diplock in *Harrocks v. Lowe* [1974] 1 All ER 662.

She expressly found that the police report stating that the company believed or was convinced that the plaintiff had committed CBT while he was the managing director of the defendant company was based on the assumption **simpliciter** that since the company had a receipt signed by the plaintiff for RM7,000 and that this RM7,000 could not be found in the accounts therefore the plaintiff had committed CBT. She held that the simple assumption by the board of the defendant company cannot constitute a positive or honest belief as envisaged by Lord Diplock and thus the defence of qualified privilege fails.

Her finding is clearly based on the evidence adduced in court and it is relevant to consider the dominant and improper motive with which the report was made. It was not a matter that the defendants had an honest or positive belief that the plaintiff had committed criminal breach of trust; they merely wanted the police, quite improperly, to assist the company to find out what had happened to the RM7,000 supposedly received and supposedly unaccounted for. The dominant motive of the 2nd defendant for making the report can be seen in the evidence of DW1, Abdul Aziz, the 1st defendant:

> We filed a report to the police for information we managed to collect after the Chua family left, the intention was because Peter left and it was not on the best of terms and it was difficult to get accounts from him ... the debt was paid and was not accounted for. We have difficulty in getting Peter or Melvin Chua to explain to us and therefore we decided to get the police to assist us.
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> Before police report was made we appointed Double R & R Debt Collectors who would eventually find the Company and instead of collecting the debt they gave us the receipt and (it) showed Peter Chua's signature and we assume that that the money was collected by Peter. We called him but he was not of assistance. We therefore decided the police would be of more assistance and therefore we lodged the police report.

The passage shows that the defendants in publishing the defamatory statement did not believe the statement to be true – they merely wanted the assistance of the police to get the plaintiff to explain to them the receipt – a misuse of the process of law and this is conclusive evidence of express malice on the part of the 2nd defendant and the 1st defendant in this case. The defence of privilege was properly rejected by the learned judge of the Sessions Court.

In this cross-appeal the plaintiff has argued that the award of RM25,000 as damages should be increased and that the order of no costs be reversed. No good reason has been advanced why the amount should be increased. RM25,000 is by no means a mean amount and it appears reasonable. As for the order of costs, costs should follow the event and I see no good reason why costs to the plaintiff were denied.

In the result the appeal is dismissed, the cross-appeal as to the question of damages is dismissed. Costs to the plaintiff here and below.